CONDUENT

FYI®
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US

Volume 41 | Issue 15 | February 13, 2018

How Much Is Too Much – Status of ADA and GINA Wellness Regulations

After finding that the EEOC's final ADA and GINA regulations, which permit a 30% wellness incentive, are arbitrary and capricious, a federal court ordered the regulations to be vacated as of January 1, 2019. It is not clear yet whether the EEOC will revise the current regulations, issue new regulations, or let the regulations be vacated without taking further action. Without regulations, employers will face uncertainty about whether a wellness program that asks for medical information (e.g., biometric screenings and health risk assessments) and/or that inquire about a spouse's medical conditions (e.g., spousal health risk assessments) would be considered voluntary.

Background

In 2016, the EEOC issued final rules for wellness programs under both the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). The ADA generally prohibits employers from requiring employees to undergo a medical examination that could divulge information about a disability (e.g., biometric screenings) and from inquiring about either the existence of, or the nature or severity of an employee's disability (e.g., a health risk assessment, or HRA) unless the requirement or inquiry is job-related or part of either a "bona fide benefit plan" or a "voluntary employee health program." GINA prohibits group health plans, insurers and employers from discriminating on the basis of an individual's "genetic information." Among other things, it prohibits employers from requesting, requiring or purchasing information about the current or past health status of a spouse or other family member. Information about the medical conditions of an employee's spouse is considered genetic information of the employee (even though the employee and spouse do not share any genetic material).

Both the ADA and GINA provide exceptions for voluntary wellness programs. And regulations relating to both laws outline requirements for voluntary programs that involve a medical exam and/or disability-related or genetic inquiry,

generally limiting incentive amounts to 30% of the cost of self-only coverage. For background on those rules, see our June 17, 2016 *FYI In-Depth*.

In October 2016, AARP filed suit against the EEOC on behalf of its members, alleging that the 30% incentive permitted under the ADA and GINA regulations is "arbitrary, capricious, an abuse of discretion and contrary to the law." The court found that the EEOC had not provided an adequate basis (i.e., justification) in its regulations for concluding that the 30% incentive limit is a reasonable interpretation of voluntariness (as required by the statute), and instructed the EEOC to review and revise its regulations. However, it did not vacate (i.e., throw out) the challenged rules at that time because of concerns that this would be too disruptive. Proposing a schedule for its review of the existing regulations, the court also directed the EEOC to file a status report. In September 2017, the EEOC told the court that it expected to issue a proposed rule by August 2018 and a final rule by October 2019 (with the expectation that the final rule would not be applicable until the beginning of 2021). (See our December 1, 2016 and October 31, 2017 issues of *For Your Information*.)

What's Next?

In late December, AARP filed a motion asking the court to modify its earlier judgment and to either vacate the regulations as of January 1, 2018 or enjoin the EEOC from enforcing them as of that date. The judge ordered the EEOC to provide status reports on the progress of the regulatory review process said that the court would hold the EEOC to its intended deadline of August 2018 for issuing proposed rules. The court was displeased that new regulations might not be applicable until 2021 and "strongly encouraged" the EEOC to move up its deadline. The court ordered that, barring new proposed or final regulations, the current regulations would be vacated as of January 1, 2019.

Most recently, the EEOC pushed back with a motion asking the court to reconsider, arguing that the agency should not be subject to a set schedule for issuing regulations. The court agreed with the EEOC that it could not require the agency to stick to a set schedule, but maintained that the current regulations would be nullified as of January 1, 2019.

The Commission

The EEOC is a bipartisan commission comprised of five presidentially appointed members. No more than three commissioners can be from the same political party. Commissioners are appointed by the President and confirmed by the Senate for five-year terms. Currently, two commissioners are awaiting Senate confirmation. Once confirmed, the Republicans will hold a majority. The EEOC's long-time general counsel recently retired and that position has not yet been filled. The general counsel supports the Commission, among other things, providing direction, coordination, and supervision to the EEOC's litigation program.

With the nullification of its regulation looming, the EEOC could either reissue the same regulations but provide more appropriate justification for why a 30% incentive is reasonable and voluntary, allow the regulations to be vacated, or do something else — like issue completely new regulations.

While the current EEOC regulations do use concepts from the HIPAA wellness regulations, they contain differences. For example, the HIPAA regulations limit incentive amounts generally to 30% of the cost of coverage in which the employee is enrolled, while the ADA regulations limit incentive amounts generally to 30% of the lowest cost plan. For more specifics on the differences between the HIPAA, ADA and GINA wellness regulations see our June 17, 2016 *FYI In-Depth*. Some experts suggest that the EEOC could issue regulations that more closely mirror or adopt the HIPAA wellness regulations or suggest that compliance with the HIPAA regulations would satisfy the ADA and GINA.

Comment. In its initial ruling, the court rejected the EEOC's argument of harmonizing its regulations with HIPAA, stating that HIPAA does not contain a voluntary requirement, which is statutorily mandated in the ADA and GINA and that HIPAA's directive — prohibiting health coverage discrimination — differs from the protections of the ADA and GINA. It would seem that Congress could provide a legislative fix, referencing the HIPAA statute. In fact, such legislation has been introduced, but has not progressed. (See our March 6, 2017 and March 27, 2015 issues of *Legislate*.) It will be interesting to see what strategy the EEOC takes.

It's important to note that the order will only vacate the portions of the ADA and GINA regulations that relate to the amount of the incentive. Other requirements, such as the notice requirement, appear to remain in effect and would be required for programs that contain health risk assessments or biometric screenings, even without incentives.

Enforcement

For the time being, the existing ADA and GINA regulations remain in effect. Employers should continue to comply with them but still consider the strategies they might take if the regulations lapse. Will they continue to maintain their programs, provide more aggressive incentives or take a more conservative approach?

Comment. Without any regulations, the employee benefits community could slip back into the more litigious environment that existed prior to the issuance of the current regulations. But this time, given the history with the regulations and new leadership in the White House and at the EEOC, it's possible the agency might be more reluctant to bring complaints. It's also important for employers to consider their employee population and whether a more aggressive incentive could impact employee morale.

EEOC and Litigation

Individuals bringing an ADA or GINA claim generally must file a charge with the EEOC within 180 days of the alleged violation. After investigation, the EEOC will either file a lawsuit or issue a "Notice of Right to Sue" letter (often referred to as a right to sue letter), allowing the individual who brought the charge to file a lawsuit within 90 days. Remedies available under Title VII of the Civil Rights Act of 1964 are also available for ADA and GINA, meaning that, for employers with more than 500 employees, each individual can recover up to $300,000 in damages from an employer on account of a successful ADA or GINA claim.

In Closing

For the moment, the ADA and GINA wellness program rules remain in play. While interaction between HIPAA, ADA and GINA create some challenges for employer-provided wellness programs, the current ADA and GINA rules provide a roadmap for acceptable incentive limits. Without that roadmap, some employers may feel lost. If the ADA and GINA regulations lapse without a replacement, employers will need to address their wellness program designs to determine comfort level and any associated risk (e.g., employee morale) with incentive limits. Some may reset and take a more conservative approach; others might stay the course or provide more aggressive designs.

Authors
Sharon Cohen, JD
Leslye Laderman, JD, LLM

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